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IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, *et al.*,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Whether a state commission's action related to the enforcement of a previously approved section 252 interconnection agreement is a "determination under [section 252]" and thus reviewable in federal court under 47 U.S.C. §252(e)(6).

Whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

PARTIES TO THE PROCEEDING

Petitioners are Richard L. Mathias, Terry S. Harvill, Edward C. Hurley, Ruth K. Kretschmer, and Mary Frances Squires, who are currently, and were at the time of the final order of the United States Court of Appeals for the Seventh Circuit denying rehearing (Pet. App. 1a-2a), the members of the Illinois Commerce Commission. (At the time of the filing of the federal district court action in this case, the commissioners were Dan Miller, Richard Kolhauser, Ms. Kretschmer, Karl McDermott and Brent Bohlen.)

Respondents are: Illinois Bell Telephone Company d/b/a Ameritech Illinois; WorldCom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc.; MCI Telecommunications Corp.; MCImetro Access Transmission Services, Inc.; Focal Communications Corp.; Teleport Communications Group, Inc.; and AT&T Communications of Illinois, Inc.

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OPINIONS BELOW

The opinion of the court of appeals as initially issued (Pet. App. 6a-22a) is reported at 179 F.3d 566. The opinion was amended by subsequent order (Pet. App. 3a-5a), which was not reported. The opinion of the district court (Pet. App. 23a-35a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered June 18, 1999 and amended August 9, 1999. That court denied Petitioners' petition for rehearing on August 9, 2000. Justice Stevens granted Petitioners' application to extend the date for filing the petition for *certiorari* to November 28, 2000, and the petition was filed that day. The petition was granted on March 5, 2001. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause, U.S. Const., art. I, § 8, cl. 3, provides that "[t]he Congress shall have Power To regulate Commerce with foreign Nations, and among the several States ."

The Supremacy Clause, U.S. Const., art. VI, cl. 2, is reprinted at Pet. App. 36a.

The Eleventh Amendment, U.S. Const., amend. XI, is reprinted at Pet. App. 36a.

Title 47, United States Code, §§ 251 and 252, are reprinted in the Appendix to this Brief. Of particular relevance here, § 252(e)(6) provides in part that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [47 U.S.C.] section 251 and this section."

STATEMENT OF THE CASE

This case involves a suit brought in the United States District Court for the Northern District of Illinois by Respondent Ameritech Illinois ("Ameritech"). Included as defendants, along with other Respondent telecommunications carriers, were the five members of the Illinois Commerce Commission ("ICC"), who were named "in their official capacities and not as individuals." Jt. App. 125a. The suit sought review of an order of the ICC that had disposed of complaints the other carriers had filed against Ameritech. In these complaints the carriers charged that Ameritech had breached interconnection agreements with them by failing to make certain payments. The ICC agreed with the carriers and directed Ameritech to make the disputed payments. Ameritech sought review of the ICC decision in federal district court pursuant to 47 U.S.C. § 252(e)(6), part of the federal Telecommunications Act of 1996.

A. The Illinois Commerce Commission. The ICC is an agency of the State of Illinois, and was created in 1913 as the State Public Utilities Commission, *American Nat'l Bank & Trust Co. v. Pennsylvania R. R. Co.*, 35 Ill. 2d 145, 148 (1966). Its conduct is governed by the Illinois Public Utilities Act ("IPUA"), 220 ILCS 5/1-101 *et seq.* The ICC consists of five members appointed by the Governor. 220 ILCS 5/2-101. "Every finding, order or decision approved by a majority of the members of [the ICC] shall be deemed to be the finding, order or decision of the Commission." *Id.* The ICC is charged with the "general supervision of all public utilities," 220 ILCS 5/4-101, as well as the enforcement of "the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal," 220 ILCS 5/4-201.

The ICC's duties include the adjudication of complaints, which may be brought by the ICC itself or by, *inter alia*, "any person or corporation." The Commission may hold

hearings on complaints, at which the complainants and respondents may be heard and evidence received. After the hearing the ICC is required to make findings of fact and enter an order based on those findings. 220 ILCS 5/10-108, 10-110. In the event the ICC fails to enter an order within a specified time, any party may seek an order of mandamus from a state trial court compelling the ICC to act within sixty days. 220 ILCS 5/10-108.[1] ICC decisions are subject to judicial review in the Illinois Appellate Court and the Illinois Supreme Court. 220 ILCS 5/10-201 and 202.

B. The Telecommunications Act of 1996. On February 1, 1996, Congress passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) ("the 1996 Act" or "the Act"). This extensive legislation amended, but did not repeal, the Federal Communications Act of 1934 ("the 1934 Act"). Under the 1934 Act (and even before its passage), regulation of telephone service had been divided between the federal and state governments. The federal government, acting through the Federal Communications Commission ("FCC"), had regulated interstate, long-distance service, and state governments, acting primarily through state public utilities commissions like the ICC, had regulated local (intrastate) service. 47 U.S.C. § 152(a) & (b); *Louisi-*

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[1] These procedures apply to complaints involving telecommunications rates and services. 220 ILCS 5/13-101. After passage of the Telecommunications Act of 1996, discussed *infra*, the IPUA was amended to add specified substantive bases for finding that a telecommunications carrier had "impede[ed] the development of market competition." These included, but were not limited to, eight grounds, one of which was violating or delaying implementation of an interconnection agreement entered into under § 252 of the 1996 Act, 47 U.S.C. § 252. 220 ILCS 5/13-514 and 514(8) (Pet. App. 46a-47a). These amendments did not alter the ICC's general obligation to adjudicate complaints under 220 ILCS 5/13-515.

ana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986); *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 403-04 (1999) (Thomas, J. concurring and dissenting). The 1996 Act added new sections, and amended existing ones, in a number of areas, including telecommunications (Title I).

Before the 1996 Act, local telephone service was considered a natural monopoly and regulated as such. *Iowa Util. Bd.*, 525 U.S. at 371. One of the principal changes the Act made was to introduce competition into local telephone markets. In order to accomplish this goal, the Act imposes certain general duties on all local exchange carriers ("LECs") and particular obligations on existing or incumbent LECs. 47 U.S.C. § 251. All LECs are required to avoid unreasonable or discriminatory conditions on the resale of telecommunications services (§ 251(b)(1)), to maintain elements of those services in ways that facilitate access among networks by other providers (§ 251(b)(2)-(4)), and to establish arrangements for reciprocal compensation to one another for transporting and terminating calls placed by each others' customers (§ 251(b)(5)).

Competition in the local telephone markets would require new entrants. Recognizing that new providers could not rapidly and efficiently duplicate the local networks that had been developed over time by incumbent LECs, Congress required each incumbent LEC "to share its network with competitors." *Iowa Util. Bd.*, 525 U.S. at 371. As a general obligation, all telecommunications carriers were required to interconnect with each others' facilities. 47 U.S.C. § 251(a)(1). Section 251(c) imposed additional obligations on incumbent LECs, including Ameritech, to allow interconnection with their existing networks by any carrier requesting it, to negotiate in good faith agreements providing for interconnection, to let other carriers gain unbundled access to discrete elements or features of their networks, and to allow purchase of their services at wholesale prices for resale.

The vehicles for achieving network interconnection under § 251(c) are agreements negotiated in accordance with § 252 of the Act. Section 252 establishes procedures for negotiating, arbitrating, and approving agreements for interconnection, services, or network elements between incumbent LECs and requesting carriers.[2] It creates a four-step process for accomplishing this task and designates state utilities commissions as the primary regulatory actors.

First, the Act allows incumbent LECs and requesting carriers to negotiate their own agreements privately. If they do, § 252(a)(1) relieves them of the obligations of subsections 251(b) and (c) and allows them simply to submit the agreements to the state commission for approval under § 252(e), as discussed below. The Act also provides that a party to negotiations can ask the state commission to mediate any differences that may arise (§ 252(a)(2)).

Second, if private or mediated negotiations prove unsuccessful after a specified time, § 252(b) provides for compulsory arbitration of disputed terms by the state commission. The commission must resolve all unresolved issues within nine months from the time the incumbent LEC receives the initial request for negotiation. *See* § 252(b)(4)(A) & (C).

Third, § 252(e)(1) requires that all interconnection agreements be submitted to the state commission for approval. The grounds on which a commission can reject an agreement or part thereof depends upon how it was reached. Where the parties have negotiated their own agreement, or part thereof, a commission may reject it only if it finds either that the agreement or provision discriminates against a carrier not a

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[2] Although § 252 and these agreements provide for several aspects of local telephone service listed in § 251(c), including but not limited to interconnection, this brief will refer to these agreements generally as "interconnection agreements."

party to the agreement or that it is not in the public interest, § 252(e)(2)(A). An agreement (or part thereof) adopted by arbitration, however, may be rejected if it fails to comply with § 251, with any regulations promulgated by the FCC under § 251, or with pricing standards prescribed in § 252(d). See § 252(e)(2)(B). Once a final agreement is submitted, a commission must act on it within ninety days if it was a negotiated agreement (or portion of an agreement), or thirty days if it was an arbitrated agreement (or arbitrated portion of an agreement). If the commission does not, the agreement is deemed to be approved without further action, § 252(e)(4).

The Act also addresses a state commission's "fail[ure] to act to carry out its responsibility under" § 252. In that event, the FCC is directed to issue an order "preempting" the state commission and assume that commission's responsibilities. *See* § 252(e)(5).

Fourth, Congress addressed judicial review of determinations made under § 252. Initially, § 252(e)(4), the section that compels submission of interconnection agreements for approval by state commissions, adds that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." In addition, § 252(e)(6) provides as follows:

> **Review of State commission actions.** In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC's] actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or

> statement meets the requirements of section 251 and this section.

C. The Interconnection Agreements in This Case. Following the passage of the Act, Respondents Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom")[3], Focal Communications Corporation of Illinois ("Focal"), AT&T Communications of Illinois, Inc. ("AT&T"), and MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (jointly "MCI") (collectively "the competitive carriers") all initiated negotiations with Respondent Ameritech pursuant to 47 U.S.C. §§ 251(c)(2) and 252(a)(1). They sought to reach agreements that would allow them access to Ameritech's existing local network. Ultimately, agreements were reached in all cases and submitted to the ICC for approval in accordance with § 252(e)(1). The TCG, WorldCom, and Focal agreements were privately negotiated without any ICC involvement. The MCI and AT&T agreements were arbitrated by the ICC in part, but none of the arbitrated provisions concern the reciprocal compensation issues underlying this case. Accordingly, all of the reciprocal compensation provisions in the agreements were privately negotiated. Pursuant to § 252(e)(1), the ICC approved all of the interconnection agreements at various dates between July 30, 1996 and April 28, 1997. Jt. App. 132a. No party sought judicial review of the reciprocal compensation provisions of the agreements.

D. Proceedings in the Illinois Commerce Commission. In September and October of 1997, after the agreements between Ameritech and the competing carriers had been in effect for months (and in the case of WorldCom, over a

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[3] The agreement to which Respondent WorldCom Technologies, Inc. is a party was initially sought by MFS Intelenet of Illinois, Inc., to which WorldCom is the successor in interest. *See* p. ii *supra*.

year), Respondents TCG, WorldCom and MCI filed complaints with the ICC. Jt. App. 52a-95a. Each competing carrier charged that Ameritech had breached the terms of its interconnection agreement. Jt. App. 53a, 79a, 93a. According to each complaint, Ameritech violated the agreements by refusing to compensate the competing carrier for transporting and terminating calls made by Ameritech customers to internet service providers ("ISPs") that were customers of the competing carrier. The carriers alleged that these were local calls for which reciprocal compensation was required under the agreements, but that Ameritech had stopped making payments for them and claimed that they were actually long-distance calls not covered by the agreements' reciprocal compensation provisions. Jt. App. 55a-56a, 81a-82a, 91a-92a. In each complaint, the complaining carrier invoked the jurisdiction of the ICC under the IPUA. *See* Jt. App. 52a, 90a (citing the IPUA generally, 220 ILCS 5/1-101 *et seq.)*; 79a (citing 220 ILCS 5/4-101, which provides the ICC with general supervision over public utilities). Shortly after these complaints were filed, Respondents Focal and AT&T filed petitions to intervene. The ICC consolidated the three complaints and two intervention petitions and evidentiary hearings were held, *see* Jt. App. 97a-99a.

On March 11, 1998, the ICC entered a unanimous written order granting the consolidated complaints and finding that the disputed calls to ISPs were subject to reciprocal compensation according to the terms of the interconnection agreements. Jt. App. 96a-124a. After reviewing the facts and positions of the parties, the ICC held that Ameritech's conduct in cutting off reciprocal compensation payments had violated the terms of those agreements. Jt. App. 114a, 121a. Accordingly, the ICC ordered Ameritech to compensate the complainants for all past due reciprocal compensation amounts and ordered Ameritech and the complainants to resume making payments. Jt. App. 123a.

E. Proceedings in the Courts. On March 27, 1998, Ameritech filed suit in the United States District Court for the Northern District of Illinois seeking review of the ICC's order under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. Jt. App. 125a-145a. In its complaint, Ameritech named as defendants the Respondent competing carriers and the incumbent five members of the ICC "in their official capacities and not as individuals" but did not name the ICC itself. Jt. App. 125a, 130a. The commissioners moved to dismiss all claims against them, arguing, among other things, that the district court lacked subject matter jurisdiction over Ameritech's complaint under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331 and that the Eleventh Amendment barred the action against them. On May 20, 1998, the district court indicated that it would rule on the commissioners' motion separately from the merits of the complaint, without prejudice to the commissioners' positions regarding jurisdiction. *See* Pet. App. 24a; Jt. App. 181a.

On July 21, 1998, the district court issued its decision on the merits of the complaint, affirming the ICC's ruling that Ameritech owed the competing carriers reciprocal compensation payments for calls placed by Ameritech customers to the carriers' ISP provider customers. Jt. App. 147a-180a. The court rejected part of the ICC's analysis, but specifically agreed with the ICC's conclusions based on interpretation of the agreements and industry practice. Jt App. 175a. On August 4, 1998, the district court entered judgment against Ameritech (as Illinois Bell) and in favor of the competing carriers. Jt. App. 181a-183a. In addition, on May 14, 1998, Ameritech filed a petition for review of the ICC's order in the Illinois Appellate Court pursuant to 220 ILCS 5/10-201. That court granted Ameritech's motion to stay proceedings pending the resolution of this case.

On August 25, 1998, the district court denied the commissioners' motions to dismiss the actions. Pet. App. 23a-35a.

The court read § 252(e)(6) to give it exclusive jurisdiction to review the actions of the ICC in interpreting and enforcing agreements that had been formed and approved under the Act because such a reading was "consistent with the goals and structure of the Act," Pet. App. 28a, and added that allowing state courts to review state commission rulings would "run afoul of Congress' intent," Pet. App. 29a. The court further held that the suit was not barred by the Eleventh Amendment for two reasons: the State's "voluntary participation" in the scheme set forth in the Act constituted a waiver of its Eleventh Amendment immunity; and *Ex parte Young*, 209 U.S. 123 (1908), allowed the suit to proceed against individual commissioners because it sought prospective relief and involved ongoing violations of federal law. Pet. App. 30a.[4]

Ameritech appealed the district court's ruling on the merits to the United States Court of Appeals for the Seventh Circuit, and Petitioners cross-appealed on subject matter jurisdiction and immunity. On June 18, 1999, a panel of the court of appeals affirmed the district court's rulings, both on those issues and on the merits. Pet. App. 6a-22a. In considering the merits, the court declined to review the ICC's order for compliance with state law, confining itself instead to whether the ICC's order "violated federal law." Pet. App. 15a. In doing so, the court relied substantially on its earlier opinion in *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 168 F.3d 315, 320, *as amended*, 183 F.3d 558 (7th Cir. 1999) (*"MCI I"*). The court held, in accordance with *MCI I*, that state commission decisions "implementing" the Act were reviewable in federal court under 47 U.S.C. § 252(e)(6), Pet. App. 13a (citation and internal quotations

[4] The district court also rejected the commissioner's arguments based on res judicata, collateral estoppel and abstention. Pet. App. 30a-35a.

omitted). The court also followed *MCI I* in concluding that state commissions were intended by Congress to be parties to suits reviewing their "actions." *Id.* Rejecting Petitioners' Eleventh Amendment defenses, the court of appeals again relied on *MCI I*, in which it had decided that the state's participation in the Act's scheme for regulating local telecommunications constituted a constructive waiver of its sovereign immunity. Pet. App. 13a; *MCI I*, 183 F.3d at 564-66.[5]

On June 23, 1999, five days after the court of appeals initially decided this case, the Court issued its opinions in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), *Alden v. Maine*, 527 U.S. 706 (1999), and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999). Two days later, the court of appeals granted rehearing in the *MCI* case. On August 19, 1999, the panel in the instant case ordered the commissioners' petition for rehearing held in abeyance pending the decision on rehearing in *MCI I*. In doing so, the panel amended its earlier opinion to make more explicit its holding that federal review under 47 U.S.C. § 252(e)(6) was limited to whether a state commission's decision "depart[ed] from federal law," and that "[a] decision 'interpreting' an agreement contrary to its terms" gave rise to a problem "under the law of contracts, and therefore one for which a state court can supply a remedy." Pet. App. 4a-5a. The court noted that this "allocation of authority" would require an aggrieved party to present its federal law challenges

[5] The court of appeals did not address the commissioners' arguments regarding the application of *Ex parte Young*. It did observe that, even though the ICC itself had not been named as a defendant, the commissioners "[i]n their official capacity... are the Commission." Pet. App. 14a. The court also did not address the commissioners' arguments regarding the applicability of 28 U.S.C. § 1331, *res judicata*, collateral estoppel or abstention.

to a state commission's decision in federal court and then proceed in state court if it was unsuccessful. *Id.*

On rehearing in *MCI*, the Seventh Circuit reaffirmed its earlier decision. *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000) ("*MCI II*"). The *MCI II* court considered *College Sav. Bank* but held that the doctrine of constructive waiver had survived that decision in certain contexts. *Id* at 339-40. The court held that the "structure" of § 252(e)(6) had clearly expressed Congress' intent to condition the States' participation in regulation under the Act upon waiver of sovereign immunity despite the absence of express language to that effect. *Id.* at 341. The court further held that Illinois had "unequivocally" waived its immunity, likening the ICC's participation in regulation under the Act to the acceptance of an "invitation to receive a 'gratuity'" from Congress. *Id.* 342-43. The court noted that Congress had the power under the Commerce Clause to assign all regulation of the telecommunications industry to the federal government, and concluded that after the passage of the Act "the regulation of interconnection agreements... [is] no longer, in the terms employed by the Supreme Court in *College Savings*, [an] 'otherwise permissible activit[y]' for the states." *Id.* at 343. Following the issuance of the *MCI II* opinion, the panel in the instant case denied rehearing, citing *MCI II*. Pet. App. 1a-2a.

Petitioners sought *certiorari* on November 28, 2000. Ameritech filed a petition for *certiorari* of its own seeking review of the decision of the court of appeals affirming the order of the ICC on the merits. That petition, No. 00-921, is still pending as of the filing of this brief.

SUMMARY OF ARGUMENT

This case presents three questions. The first is whether a provision that, by its terms, restricts federal jurisdiction to decisions made "under" a section governing the formation and approval of interconnection agreements should also be read, despite that plain limitation, to authorize review of decisions interpreting and enforcing those agreements after they have gone into effect. The answer to this question is that such decisions are not made "under" 47 U.S.C. § 252, and therefore review of them falls outside the jurisdiction conferred by § 252(e)(6). Section 252 prescribes in detail procedures relating to the *formation* and *approval* of interconnection agreements in accordance with the obligation to enter into them imposed by § 251, but says nothing at all about any subsequent commission action. Under the unambiguous language of the statute, then, cases involving the interpretation or enforcement of agreements already in place do not involve "determinations under [§ 252]", a necessary qualifier for review under § 252(e)(6).

This plain-language reading of the statute is consistent with the overall scheme of the 1996 Act, which introduced competition in local telephone markets by mandating that carriers provide access to each others' networks. That goal is accomplished through the making of interconnection contracts and does not further require micromanagement of the ensuing business relationships among carriers by federal courts. This reading of § 252(e)(6) is further consistent with the principle that federal review statutes should be considered strictly, as well as with the Act's own provision that state law is preempted only where expressly stated. It also reflects the behavior of the Respondents in this case, who included provisions in their voluntarily-negotiated agreements invoking Illinois law, and especially the actions of the competing carrier Respondents, who invoked state law and complained of breaches of contract in their complaints to the

ICC. Finally, even if this reading is only one acceptable construction of § 252(e)(6), the Court should adopt it to avoid the difficult constitutional issues raised by the second and third questions presented in this case.

The second and third questions relate to the State of Illinois' sovereign immunity. The second question asks whether Illinois has waived its Eleventh Amendment immunity by the act of participating in the regulatory scheme prescribed by Congress in § 252. As argued above, the ICC was not operating under the 1996 Act at all by interpreting and enforcing interconnection agreements. Even if the Court disagrees, there has been no waiver; indeed, Congress has not with sufficient clarity expressed its intent that state commission participation be conditioned on waiver. (As with jurisdiction itself, as described in Part I of our argument, almost everything involving § 252(e)(6) must, if it is to be found at all, be inferred from some source other than text.) For the State's own part, no express waiver of immunity is claimed, and the State has made no unequivocal declaration of its willingness to be sued.

Moreover, no constructive waiver occurred. After the Court's decision in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), no constructive waiver is possible when, as in the Act, Congress has exercised regulatory powers. In this case, rather than voluntarily waiving its immunity, the State has been unconstitutionally coerced into federal court by the threat of the exercise of federal power, and not induced to assent to suit by the bestowing of any "gratuity" by Congress. The threat made by Congress in § 252 was to exclude the State from regulatory activity that it has been conducting for decades. Although the Act represents a significant exercise of Commerce Clause power by Congress, even in the area of local telephone service, Congress has not preempted State regulation. Instead, it has explicitly authorized the FCC to preempt

state commission jurisdiction only when the state commission fails to act. The ICC's adjudication of these complaints was therefore "lawful"; indeed, it was core state governmental activity that the ICC was required to perform under both state and federal law. To decline to participate in the proceedings contemplated by § 252 was neither a practical nor legal option for the ICC. Absent a valid waiver, the district court was without jurisdiction to entertain this suit against Petitioners.

The third question involves whether, despite the State's immunity, federal court review of these decisions under § 252(e)(6) can nonetheless be achieved by means of an official-capacity action against individual commissioners under *Ex parte Young*. This suit, which in fact named the members of the ICC as defendants, was in reality a suit against the ICC itself, and therefore against the State of Illinois. The claimed legal errors, even errors of federal law, made by the ICC members acting within their jurisdiction were not violations of federal law and therefore did not strip the commissioners of their lawful authority simply because a reviewing federal court might later see the law differently.

Exposing individual commissioners to the full range of a federal court's powers would also be inconsistent with § 252(e)(6) itself. That subsection provides only for review of an order of a state commission, not for any action against an individual commissioner. The commissioners did nothing but consider and vote; the order they issued, and of which review was sought, was that of the ICC. Accordingly a suit against individual commissioners would exceed the limits of the remedial scheme provided for by Congress in § 252(e)(6), a detailed scheme that restricts the relief available to review of whether an agreement approved by a state commission complies with federal law. At most then, § 252(e)(6) contemplates relief analogous to customary judicial review of decisions of administrative bodies like the

FCC, and not lawsuits that would subject individual commissioners to a federal court's equitable powers.

ARGUMENT

I. STATE COMMISSION DECISIONS INTERPRETING AND ENFORCING INTERCONNECTION AGREEMENTS ARE NOT REVIEWABLE IN FEDERAL COURT UNDER § 252(e)(6).

The court of appeals held that the jurisdiction granted under 47 U.S.C. § 252(e)(6) encompassed the review of decisions of state utilities commissions that interpreted and enforced interconnection agreements, as well as those approving them or arbitrating their terms. In so holding, the court ignored language that plainly limits application of § 252(e)(6) to determinations made "under" § 252 itself. That provision, in turn, addresses only the formation and approval of agreements. The court's decision violated principles of statutory construction, some long-settled and some specifically set forth in the 1996 Act, by interpreting the statute according to its perceived general "scheme." Even if appropriate, moreover, an examination of the plan reflected in the Act, as well as the actions of the parties in this case, shows that the Act left responsibility for interpreting and enforcing agreements among local telephone providers, and the review of those actions, where they have always been: in the hands of the States.

A. The Plain Language of § 252(e)(6) Limits Federal Court Review of State Commission Actions to Those Involving the Arbitration or Approval of Interconnection Agreements.

In holding that § 252(e)(6) allowed the district court to review the decision of the ICC in this case, the court of appeals ignored the primary limitation of that provision, namely that the "determination" of which review is sought

be made "under" § 252 itself. The Court should reject the court of appeals' interpretation in favor of one giving effect to that plain and unambiguous restriction.

The starting point for the construction of any statute is the language of the statute itself. *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Where the language of the statute is plain, it is regarded as conclusive, and any inquiry as to its meaning should ordinarily end. *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 261 (1997); *GTE Sylvania*, 447 U.S. at 108. In addition, the nature of the provision at issue in this case also calls for a narrow reading. Because federal courts are limited in their jurisdiction, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), statutes conferring federal jurisdiction, including the power to review other bodies' decisions, are strictly construed. *Stone v. INS*, 514 U.S. 386, 405 (1995) ("Judicial review provisions... are jurisdictional in nature and must be construed with strict fidelity to their terms."); *Shamrock Oil Co. v. Sheets*, 313 U.S. 100, 108-09 (1941).

In this case, the court of appeals held that the district court had jurisdiction to entertain Respondent Ameritech's suit under § 252(e)(6), in which Ameritech sought review of a decision of the ICC interpreting and enforcing provisions of its interconnection agreements with the remaining Respondents. That section provided for such an action only as follows:

> In any case in which a State commission makes a determination *under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

47 U.S.C. § 252(e)(6) (emphasis supplied).

The language of this provision plainly limits the type of state commission determination reviewable in federal court to one involving the formation of an interconnection agreement, as opposed to its later interpretation and, if necessary, enforcement. The requirement that the determination to be reviewed be one made "under this section," *i.e.* under § 252, is announced in the initial clause as a necessary prerequisite to going any further. Section 252 sets out procedures only for the negotiation, arbitration and approval of agreements. Although it addresses in some detail the process of formation of interconnection agreements--including negotiation that leads to voluntary agreement, arbitration if the parties cannot agree on any issues, and the requirement that the state commission approve the agreement before it goes into effect and the grounds on which a commission may reject an agreement--that section is utterly silent regarding how, or by whom, an agreement is to be interpreted and enforced once it has gone into effect.[6] This limitation is unambiguous; a determination must be made "under" § 252, that is, made in connection with the listed procedures for formation or approval of an agreement, to qualify for federal court review under § 252(e)(6). *See Ardestani v. INS*, 502 U.S. 129, 135 (1991) ("natural" reading of "under section 554" is "subject to" or "governed by" 5 U.S.C. § 554) (internal quotations omitted).

Although no clearer limitation is necessary, other language in this provision and elsewhere in § 252 demonstrates that federal review is restricted to formation cases. The

[6] Similarly, § 251, which imposes the substantive obligation to interconnect for which the procedures in § 252 are prescribed, imposes duties to interconnect, to provide technically for interconnection to be workable and to negotiate agreements in good faith, but goes no further into the parties' relationship.

scope of federal court review provided by § 252(e)(6) is cabined in a way that applies to the contract formation and approval process but not to subsequent interpretation. Section 252(e)(6) allows federal actions only "to determine whether the agreement or statement[7] meets the requirements of section 251 and [§ 252]." Review of whether the content of an agreement complies with those requirements should occur at the time the agreement is approved. In addition, § 252(e)(4), which provides for the automatic approval of an agreement if the state commission does not approve or reject it within a specified time, adds that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." This provision indicates that Congress did, in fact, consider the possibility of state court review of state commission determinations regarding interconnection agreements, and chose to prohibit it only as to decisions "approving or rejecting" them. The specificity of this limitation suggests that Congress did not intend to preclude customary state court review of other determinations made by state commissions, including those interpreting and enforcing agreements among utilities they regulated.

The court of appeals failed to apply the proper plain-language analysis, both in the instant case and in *MCI II*; indeed, it did not even address the "axiomatic" principle, *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985), that it was required to consider the statutory language first and to find it conclusive if it was plain. By failing to address the effect of the scope of § 252 on the limiting language of § 252(e)(6), the court essentially read the words "under this

[7] The "statement" referred to is a "statement of generally available terms," which carriers that were formerly components of the Bell telephone system (including Respondent Ameritech) may prepare and similarly submit for state commission approval under the subsection immediately following, § 252(f).

section" out of the statute. The closest the court came to considering any language in § 252(e)(6) was to cite its title ("Review of State commission actions") in deciding that Congress intended to make state commissions parties to suits under § 252(e)(6). *MCI II*, 222 F.2d at 337. If inclined to consider titles, though,[8] the court should have looked to the title of § 252 itself, "[p]rocedures for *negotiation, arbitration and approval of agreements*," (emphasis supplied), which also does not encompass interpretation or enforcement of those agreements. Instead of evaluating the legal effect of the plain nature of the limiting language, the court of appeals simply "decline[d] to read subsection 252(e)(6) so narrowly," and held that "[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission." *Id.* at 337-38.

The court of appeals ignored fundamental statutory construction principles in favor of an interpretation based on "the provisions of the [1996] Act, read as a whole," *MCI II*, 222 F.3d at 337. This approach was rejected in *Ardestani*, in which the Court held that, despite its belief that "the broad purposes" of the general legislation at issue would be served by a more expansive application of one of its provisions, such a reading was barred by specific language limiting its application to situations "under" a specific statute. 502 U.S. at 138. The Court should similarly reject the lower court's conclusion that § 252(e)(6) must provide for federal court review of state commission decisions outside of those involving the specific listed actions prescribed "under" § 252.

[8] Although titles cannot limit the plain meaning of statutory text, they can be a useful aid in resolving an ambiguity where there is one. *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959).

B. State Court Review of Decisions Interpreting and Enforcing Interconnection Agreements is Consistent with the 1996 Act and with the Conduct of the Parties in This Case.

Reading 47 U.S.C. § 252(e)(6) to extend only to state commission decisions arbitrating or approving interconnection agreements properly leaves review of decisions interpreting and enforcing those agreements to state courts. This is precisely where cases involving the relationships among local telephone providers have been for decades and remain under the 1996 Act. Nothing in either the Act's design or its language suggests that, once the contracts providing for interconnection are in place and have been adjudged to conform to the Act, decisions resolving disputes over the meaning of their terms must necessarily pass through the federal courts in order to accomplish the Act's goals. Indeed, this case demonstrates that federal court review is not essential to the Act.

The Court has acknowledged that in exceptional cases even plain language will be so manifestly inconsistent with legislative intent as to require a different construction. These instances are "rare," *United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989), and the Court has set the bar high, *see Ingalls Shipbuilding*, 519 U.S. at 261 (plain language controls unless result is "so absurd or glaringly unjust" as to warrant departure); *Ron Pair Enter.*, 489 U.S. at 242 (result "demonstrably at odds with the intentions of the drafters"). Nothing in the 1996 Act approaches grounds for such a conclusion in this case. It is fully consistent with the Act's local telephone provisions to leave review of the interpretation and enforcement of contracts between carriers to state courts, even where that task involves the application of federal law. This is apparent from the Act's language as well as the design and purpose of its local telephone provisions.

Before the passage of the 1996 Act, the 1934 Act had divided responsibility for telecommunications regulation between the federal government (long-distance) and the States (local). Although it made substantial changes in local telecommunications regulation, the 1996 Act did not repeal the 1934 Act and in particular did not repeal 47 U.S.C. § 152, which codified that division of regulatory responsibility. *See Iowa Util. Bd.*, 525 U.S. at 381 n.8 ("Congress, by extending [the 1996 Act] into local competition, has removed a significant area from the States' exclusive control. Insofar as Congress has remained silent, however, § 152(b) continues to function.") And although the obligations to interconnect imposed in § 251 represent a significant departure from the monopolistic model under which local telephone service had been regulated in the past, it is equally apparent that Congress did not intend to replace all state regulatory authority, including the authority of state courts. Instead, the 1996 Act left much of the States' regulatory systems in place, including the roles of state commissions as the primary regulators of local telephone carriers. There is no reason to conclude that Congress intended to displace the function of state reviewing courts except where such displacement was provided for by specific language.

Congress exercised its Commerce Clause powers upon state regulation to varying degrees in the Act, ranging from requiring state utilities commissions to apply federal law, to requiring them to conduct inquiries on certain issues, to prescribing procedures to be followed by state (and even local) bodies, and in some areas to the complete preemption of state regulatory authority. *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 300 (4th Cir.), *petition for cert. filed*, 69 U.S.L.W. 3673 (U.S. April 5, 2001) (No. 00-1531). Under the Act itself, however, explicit preemption is required to displace state law. Section 601(c)(1) of the Act provides:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.

Pub.L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (codified at note following 47 U.S.C. § 152). Accordingly, absent unequivocal language preempting a State's authority to act, Congress intended that authority to continue.

The Act's local telephone provisions contain no overt mention, much less explicit preemption, of state commission authority to interpret and enforce contracts between local telephone carriers. Similarly, the Act contains no express preemption of state laws, such as 220 ILCS 5/10-201 and 10-202, that authorize state courts to review commission rulings on those matters. That the Act *does* explicitly preempt state court review of decisions approving or rejecting contracts, *see* § 252(e)(4), demonstrates that Congress was aware of its own requirement of explicitness under the Act and knew how to satisfy it to preempt state court action. Accordingly, under the Act's own rules for displacement of state law, state court authority to review decisions other than those approving contracts has not been preempted.

Leaving the task of interpreting and enforcing interconnection agreements in the hands of state commissions and state courts of review is consistent with the goals of the Act. The change in local telephone regulation imposed by the Act involved the lifting of legal barriers to competition and the imposition on carriers of obligations designed to facilitate market entry. *Iowa Util. Bd.*, 525 U.S. at 371-72. In order to provide for market entry without requiring duplication of network facilities, Congress imposed the obligation to interconnect under § 251. The vehicle Congress chose to integrate that obligation into the relationships among carriers is the interconnection agreement provided for by § 252. These

provisions demonstrate that the goal of the Act's local telephone regulation scheme is contractual rights of access to existing networks. That objective is accomplished by the formation of agreements providing for access and the assurance that those agreements meet the requirements of federal and state law.

Once interconnection agreements are made and approved, however, the goal of the 1996 Act has been met. While interconnection agreements must be enforceable, the absence of any provision in the Act's local telephone provisions for regulatory activity beyond the process of formation and approval leaves the task of regulating the ensuing business relationships among telephone carriers to the States under their pre-existing authority. It is worth noting that interpretation cases will likely represent the great bulk of litigation regarding interconnection agreements, as an agreement need only be approved once but may be interpreted in any number of subsequent disagreements between parties. In Illinois, the task of resolving these contract disputes falls well within the statutory authority, and even the duty, of the ICC. Under the scheme of the 1934 Act, a scheme modified but not repealed by the 1996 Act, those tasks are left to the state commissions, acting in their ordinary regulatory capacity, and to state courts for review of those commission decisions.

The potential applicability of federal law–including FCC rules issued in accordance with the Act–similarly does not require that interpretation decisions be reviewed exclusively in federal court or in the "glitches" of bifurcated federal/state cases contemplated by the court of appeals in this case, Pet. App. 4a-5a. It is apparent from the Act's assignment of responsibility to state commissions that Congress deems them capable of applying, and in fact obligated to apply, federal law in connection with regulation of local telephone service. State courts are no less capable or less obligated. *See Testa v. Katt*, 330 U.S. 386, 394 (1947); 220 ILCS 5/10-

201(e)(iv)(C) (Illinois Appellate Court required to reverse decision of ICC if it violates federal constitution or laws).

This case, and especially the conduct of the parties to it, demonstrates that Petitioners' construction of the local telephone provisions of the 1996 Act is consistent with the Act's competitive objectives. Until Ameritech chose to sue in federal court, this case had been treated by the parties exclusively as a state contracts case. All of the reciprocal compensation provisions of the agreements in this case were negotiated privately, without ICC involvement. Accordingly, under § 252(a)(1), those portions were not required to comply with § 251(b) and (c), or even with pricing standards set by the ICC under § 252(d); they could only have been rejected by the ICC if they discriminated against a non-party carrier or were "not consistent with the public interest, convenience and necessity." *See* § 252(e)(2)(A) and (B). The agreements themselves also provided that to the extent issues fell outside the jurisdiction of the FCC or the ICC, they would be governed by Illinois law. Jt. App. 10a, 16a, 22a, 29a, 37a.[9]

The three complaints filed with the ICC after Ameritech stopped making reciprocal compensation payments for ISP calls invoked the ICC's general statutory authority to supervise utilities under the Illinois Public Utilities Act, 220 ILCS 5/101 *et seq.* Although they recited the prior approvals of the agreements by the ICC under the Act, the complaints alleged breaches of contracts,[10] and only one asserted that the ICC

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[9] The language invoking local law is consistent with governing law provisions in interconnection agreements used in other States as well. *See* Jt. App. 39a-51a.

[10] *See* Jt. App. 53a (TCG) ("The issue giving rise to this complaint is a simple – though important – dispute over a contract definition."); 79a (WorldCom) ("WorldCom alleges that Ameritech has violated the Agreement, the orders of the [ICC], and the [Illinois]

also had jurisdiction to enforce the contract under the Act as well as under state law. *See* Jt. App. 52a-53a, 79a, 88a, 90a and 93a-94a.[11] In its order resolving the complaints, moreover, the ICC focused on the language of the agreements themselves in determining that the parties intended ISP calls to be subject to the reciprocal compensation terms contained in those agreements. Jt. App. 112a-114a. Only thereafter did the ICC consider whether the conclusion it had reached violated any federal law or rule, including the 1934 Act (as amended by the 1996 Act) and FCC rules. Jt. App. 114a-118a. Ultimately the ICC based its determination on the specific holding that "Ameritech Illinois has violated its interconnection agreements" by failing to pay reciprocal compensation for ISP calls, Jt. App. 121a.

Like the language and design of the local telephone provisions of the Act, therefore, the conduct of the parties at the regulatory level placed this case squarely within the historic sphere of a state utilities commission exercising its general jurisdiction to adjudicate a contract dispute between telecommunications carriers. The ICC carried out its function with due regard for federal law; if they are permitted to do so, Illinois' courts will do the same. Nothing in these proceedings or in the design or language of the 1996 Act suggests that such state court review would have been inconsistent with the intention of the drafters of the 1996 Act. Absent such contradiction, the plain language of

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Public Utilities Act...."); 93a (MCI) ("Ameritech's failure to pay MCI reciprocal compensation for ISP local traffic constitutes a violation of the parties' interconnection agreement.").

[11] The complaint filed by Respondent TCG initially asserted only that it was proceeding under state law provisions, Jt. App. 52a, but later claimed that the ICC had jurisdiction to interpret and enforce interconnection agreements under both the Illinois Public Utilities Act and the federal 1996 Act, Jt. App. 57a-58a.

§ 252(e)(6) dictates that review of the ICC order in this case should be available only in the Illinois Appellate Court.

C. Section 252(e)(6) Should be Read to Confine Federal Court Review to Arbitration and Approval Decisions to Avoid the Difficult Eleventh Amendment Questions Raised By This Case.

The Court has held that "[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000); *see also Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 684 (2001); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). This is a "cardinal principle" that the Court has considered to be "beyond debate." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Thus, even if 47 U.S.C. § 252(e)(6) were ambiguous, the Court should adopt the plain-language reading of it that is advanced above. Doing so will allow the Court to avoid the significant Eleventh Amendment problems posed by the second and third questions presented in this case.

As Petitioners show in Parts II and III of this argument, by adjudicating the complaints filed in this case the ICC did not waive Illinois' Eleventh Amendment immunity from suit in federal court, and that immunity could not be avoided by a suit under the doctrine of *Ex parte Young*. Regardless of whether that suit actually violated the Constitution, however, those questions raise serious constitutional concerns. The second question turns on the issue of constructive or implied waiver, as no claim of express waiver has been made and no abrogation is possible under the Commerce Clause, *Seminole*

Tribe of Florida v. Florida, 517 U.S. 44 (1996). Even assuming a State can still constructively waive immunity in connection with an exercise of Commerce Clause powers after *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), a proposition that Petitioners do not concede, predicating waiver on a State's participation in customary regulatory activity represents a grave proposition. Similar concerns are raised by the extension of individual liability under *Ex parte Young* to members of a state regulatory commission based only on a difference of opinion regarding federal law and a jurisdictional statute providing, under its broadest reading, for "review" of that commission's actions.

Issues related to the scope of the States' sovereign immunity have divided the Court in recent years, *see, e.g., Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *College Sav. Bank* ; *Alden v. Maine*, 527 U.S. 706 (1999), *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe*. The application of the Eleventh Amendment to a provision of a federal statute that the Court has already described as "not a model of clarity," *Iowa Util. Bd.*, 525 U.S. at 397, and even "surpassing strange," *id.* at 378 n.6, demonstrates that the issues presented by the remaining questions in this case are of a grave and doubtful nature. Their presence militates even further in the direction of Petitioners' plain reading of § 252(e)(6) and the avoidance of federal court review of interpretation and enforcement decisions altogether.

II. THE ICC DID NOT WAIVE ILLINOIS' SOVEREIGN IMMUNITY BY ADJUDICATING THESE COMPLAINTS.

If the Court concludes that 47 U.S.C. § 252(e)(6) permitted the district court to entertain this suit seeking review of decisions of the ICC interpreting and enforcing interconnection agreements, the Court must decide whether that suit violated the State of Illinois' sovereign immunity.[12] There has been no suggestion in this case that Illinois has expressly waived its immunity, or that Congress could abrogate it by enacting the 1996 Act as an exercise of its Commerce Clause powers, *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The court of appeals erred in concluding that the ICC constructively waived Illinois' immunity by doing no more than ruling on complaints brought before it.

Waivers of sovereign immunity require an exchange of clear statements of intention from both Congress and the State in question. No such statement was made by either in connection with the 1996 Act or the ICC's proceedings in this case. Moreover, a State's waiver cannot be predicated on actions taken in the face of the threatened use of federal regulatory power. The assertion that the ICC accepted a "gratuity" or gift from Congress by deciding cases brought before it, even if under the terms of the Act, ignores the unilateral nature of the "invitation" Congress extended to the ICC, the terms of which were, essentially, "go to federal court or go home." "Waivers" inferred from conduct and extracted under the threat of the exclusion of a State from law-

[12] Petitioners believe that if § 252(e)(6) permits federal court suits seeking review of interpretation and enforcement decisions, the ICC should be a party to those suits. Petitioners acknowledge, for purposes of disposing of this question of state immunity, that as individual defendants they are an acceptable substitute for the ICC itself, which was not named as a defendant.

ful governmental activity are inherently coerced and cannot pass constitutional muster after *College Sav. Bank*.

A. Section 252(e)(6) Contains No Clear Statement of Congress' Intention That States be Subject to Suit in Federal Court.

Before a State will be deemed to have waived its sovereign immunity in connection with federal legislation, the Eleventh Amendment requires that both Congress and the State express their understanding in unambiguous terms. Thus Congress must first "manifest[ ] a clear intent to condition participation" in the program it has created on a State's consent to waive immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). The need for congressional clarity in this context is a natural application of the requirement that, whether by waiver or abrogation, legislation seeking to subject States to federal jurisdiction must address the immunity issue in plain terms. *Id.* (like abrogating legislation, that seeking waiver "likewise" must "evince an unmistakable congressional purpose"); *see also id.* at 246 ("When Congress chooses to subject a State to federal jurisdiction, it must do so specifically.") (citations omitted). Thus, the Court has required Congress to make its intention to subject a State to suit "unmistakably clear *in the language of the statute*." *Atascadero*, 473 U.S. at 242 (emphasis supplied); *see also Seminole Tribe*, 517 U.S. at 56; *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("[E]vidence of congressional intent must be both unequivocal *and textual*") (emphasis supplied).

The text of § 252(e)(6) fails that test. As discussed in Part I *supra*, that provision does not even plainly state that it covers decisions on issues beyond the agreement approval stage. More to the point, the language of § 252(e)(6) does not speak of who, other than the "aggrieved" plaintiff, would be a party to the suits it authorizes, and it certainly says nothing about either a State or its utility commission or commissioners be-

ing parties. Thus, the statute falls well short of those that have explicitly addressed Eleventh Amendment immunity issues and included States and their components as putative parties.[13]

Section 252(e)(6) also falls short when compared to statutes that, although not as explicit, have made congressional intent to subject States to federal suit "unmistakably clear" by describing the contemplated suit in terms that expressly provide for the State's involvement. *See Seminole Tribe*, 517 U.S. at 56-57 (statute made clear that State could be sued by, *inter alia,* addressing burden of proof on State and power of court to enter order against State). The most that can be said of § 252(e)(6), by contrast, is that it expressly provides district courts with jurisdiction to "determine whether the agreement or statement meets the requirements of" §§ 251 and 252. This grant of jurisdiction over a claim, without more, does not negate defenses to that claim, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 n.4 (1991), including the defense of sovereign immunity secured by the Eleventh Amendment, *Seminole Tribe*, 517 U.S. at 56. Even the court of appeals did not find congressional intent to subject States to suit in the *language* of § 252(e)(6), wherein those expressions must be found. It bypassed this require-

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[13] *Compare, e.g., College Sav. Bank*, 527 U.S. at 670 (describing the Lanham Act, which includes suable "persons" "any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity" (15 U.S.C. § 1125(a)(2) and provides that they "shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in federal court") (15 U.S.C. § 1122(b)); 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment... from suit in federal court for a violation of" statutes prohibiting "discrimination by recipients of Federal financial assistance"); 20 U.S.C. § 1403(a).

ment by holding that, "[a]lthough the language of the statute does not contain the express waiver language that [Petitioners] seek," the requisite intent was instead expressed in "the structure" of § 252. *MCI II*, 222 F.3d at 341. Declarations of congressional intent concealed within "statutory structure," however, do not satisfy the clear statement rule. *Dellmuth*, 491 U.S. at 232.

Given the circumstances of its passage, it is not surprising that § 252(e)(6) does not evince, expressly or otherwise, congressional intent to condition the States' involvement in local telephone regulation on waiver of their sovereign immunity. There is no dispute that, in enacting the 1996 Act, Congress was exercising its powers under the Commerce Clause. The Act was passed by Congress on February 1, 1996. Less than two months later, the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and held that Congress could not abrogate Eleventh Amendment immunity under Article I of the Constitution, *Seminole Tribe*, 517 U.S. at 66, 72-73, leaving waiver as the only way a State could lose its immunity in the face of an exercise of Commerce Clause power. Thus it is unlikely that Congress had waiver in mind in enacting the Act prior to *Seminole Tribe*.

Absent any clear expression in the text of the statute itself that Congress intended to condition the States' participation in local telephone regulation on their waiver of sovereign immunity, no such waiver may be found. For that reason alone, the court of appeals' decision should be reversed.

B. The ICC Did Not Unequivocally or Voluntarily Waive Illinois' Sovereign Immunity by Lawfully Adjudicating the Complaints in This Case.

Even if clearly asked to do so by Congress, a State must independently speak with the same clarity in waiving its sovereign immunity as is required of Congress in the asking. *College Sav. Bank*, 527 U.S. at 680-81 ("There is a fundamental difference between a State's expressing *unequivocally* that it waives its immunity, and Congress's expressing *unequivocally* its intention that if the State takes certain action it shall be deemed to have waived that immunity.") (emphasis supplied). Effective waiver of sovereign immunity by a State must demonstrate "'the intentional relinquishment or abandonment of a known right or privilege.'" *Id.* at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). To be certain that a truly knowing and voluntary waiver has occurred, a State's consent to suit must be "unequivocally expressed." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("*Pennhurst II*"); *see also Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944) (requiring a "clear declaration" of intent to submit to federal jurisdiction). The test for determining whether a State has consented to suit is "stringent," *Atascadero*, 473 U.S. at 241, and incorporates "every reasonable presumption against waiver," *College Sav. Bank*, 527 U.S. at 682 (citations and internal quotations omitted).

Without an explicit waiver in this case, the court of appeals relied on a finding that Illinois had "constructively waived" its sovereign immunity. The concept of constructive or implied waiver, however, did not survive the Court's decision in *College Sav. Bank*. Although the court of appeals thought *College Sav. Bank* had condemned only certain types of constructive waivers and had "endorsed" others, *MCI II*, 222 F.3d at 342, the Court has categorically rejected constructive or implied waivers by conduct. In *Edelman v. Jordan*, 415 U.S. 651(1974), the Court observed that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Id.* at 673. The Court expressed a willingness to find waiver by a State only where stated in express language or "by such overwhelming implications *from the text* as [will] leave no room

for any other reasonable construction." *Id.* (citation and internal quotation omitted) (emphasis supplied).[14]

Similarly, in *College Sav. Bank* itself the Court relied on authority involving waivers of sovereign immunity by the United States[15] and of other constitutional rights held by individuals where the possibility of implied waiver had been categorically rejected. 527 U.S. at 681-82. The Court saw "no reason why the rule should be different with respect to state sovereign immunity." *Id.* at 682. Finally, the Court observed that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers" would permit Congress to avoid the Court's holding in *Seminole Tribe* that Congress cannot abrogate state immunity in the exercise of those powers. *College Sav. Bank*, 527 U.S. at 683. Thus, in condemning "*Parden*-style waivers," *id.* at 682 (and overruling *Parden v. Terminal Ry. Co. of Alabama*, 377 U.S. 184 (1964)), the Court announced a rule of general application: that States cannot constructively or impliedly waive their sovereign immunity in any context. That rule requires reversal here.

In finding nonetheless that the ICC had constructively waived its sovereign immunity, the court of appeals relied on the treatment in *College Sav. Bank* of two other instances in which States were deemed to have waived constitutional rights. *See* 527 U.S. at 686-87 (distinguishing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) and *South Dakota v. Dole*, 483 U.S. 203 (1987)). The Court in *College Sav. Bank* found those cases "fundamentally differ-

[14] The Court in *Edelman* relied on *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909), which considered, and found inadequate to demonstrate waiver, the text of a state statute.

[15] *United States v. King*, 395 U.S. 1, 4 (1969) (waiver of sovereign immunity by United States "cannot be implied but must be unequivocally expressed.").

ent" because they involved a State's concession obtained by a congressional offer of a "gratuity" (in *Petty*, the conditional approval by Congress of an interstate compact under the Compact Clause, U.S. Const., art. I, § 10, cl. 3) or a "gift" (in *Dole*, the conditional disbursement of federal highway funds to a State under the Spending Clause, U.S. Const., art. I, § 8, cl. 1,). To shoehorn § 252(e)(6) into what it thought was left of the constructive waiver doctrine after *College Sav. Bank*, the court of appeals characterized the actions of the ICC in this case as acceptance of a clearly conditional gift or gratuity bestowed by Congress. Because Congress could have preempted the ICC from all involvement in the regulation of telecommunications activity, the court reasoned, that activity was no longer "permissible" or "lawful" for the ICC. Therefore, "inviting" it to participate was the offer of something to which it was not entitled, a gift that could be conditioned on the waiver of sovereign immunity without amounting to coercion. *MCI II*, 222 F.3d at 342-44. Whether or not *Dole* and *Petty* represent forms of waiver that have been "endorsed," *MCI II*, 222 F.3d at 342, or merely distinguished, they have no application here.

The federal power underlying the 1996 Act was not the authority to confer a "gift" or "gratuity" such as approval or funds. Rather, Congress regulated under its Commerce Clause power and its power under the Supremacy Clause to displace state laws. Congress exercised those powers to influence, to varying degrees, the States' own exercise of their pre-existing authority over local telecommunications, *see Bell Atlantic*, 240 F.3d at 300, not to offer the States any benefit. The court of appeals relied on the broad sweep of the Commerce Clause power, *MCI II*, 222 F.3d at 343, but the fact that Congress possesses preemptive power under the Commerce Clause does not relax the requirement that a State consent to waive its sovereign immunity. *Seminole Tribe*, 517 U.S. at 72 ("Even where the Constitution vests in Congress complete lawmaking authority over a particular area,

the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."); *see also FERC v. Mississippi*, 456 U.S. 742, 785-86 (1982) (O'Connor, J., dissenting) (Despite Congress' ability to preempt "the entire field of utility regulation," "[t]he Constitution permits Congress to govern only through certain channels.... [I]t is no answer that Congress could have reached the same destination by a different route"). In order to obtain a valid waiver of sovereign immunity under the Commerce Clause, then, Congress still had to obtain from the State an unequivocal and voluntary declaration of waiver.

To conclude that regulation of local telephone service by state commissions was no longer a "lawful" activity after the passage of the 1996 Act, the court of appeals essentially treated § 252 as if it had in fact preempted state regulation of local telecommunications and then "invited" the States back in. *See MCI II*, 222 F.3d at 343-44. The Act itself belies this notion. As noted *supra* p. 23, § 601(c) of the Act preserves preexisting federal and state law absent explicit preemption. Although § 252 prescribes rules and requires state commissions to apply them, it does not purport to preempt the States from exercising regulatory jurisdiction over local telecommunications. Indeed, § 252(e)(5) specifically provides that state jurisdiction is "preempt[ed]" only by FCC order and only when the state commission *fails* to act. Similarly, 47 U.S.C. § 152, which assigned regulatory jurisdiction over local telecommunications to the States as a matter of federal law, was not repealed by the Act. *See Iowa Util. Bd.*, 525 U.S. at 381 n.8.

Absent actual (and therefore explicit) preemption of state regulation, the ICC's resolution of the competing carriers' complaints was "lawful" or "otherwise permitted" activity, and waiver extracted under the threat of exclusion from that activity was "automatically" involuntary, *see College Sav. Bank*, 527 U.S. at 687. Indeed, under both federal and state

law, the ICC's proceedings in this case were required. The provisions of § 252 are not "invitations" to state commissions. They prescribe what a state commission "shall" do, *see, e.g.*, § 252(b)(4)(C) (state commission "shall resolve each issue" in arbitration); § 252(c)(1) (state commission "shall ensure that [arbitrated] resolutions and conditions meet the requirements of" § 251); § 252(e) (state commission "shall approve or reject the agreement"). Section 252(e)(5) speaks in similar terms, directing FCC preemption when a state commission "fails to act to carry out its responsibility" under § 252. These provisions reveal the real terms of the one-sided "invitation" extended by Congress: the States must incorporate federal rules and procedures into their regulation of local telecommunications and implicitly submit to suit in federal court by any "aggrieved" private party when they follow them.

Illinois law similarly bound the ICC. The provisions of the Illinois Public Utilities Act, in place well before the 1996 Act and invoked by the competing carrier Respondents in their complaints (Jt. App. 52a, 79a, 90a), require the ICC to dispose of complaints brought before it and even provide for the issuance of writs of mandamus if the ICC does not issue orders resolving the complaints within a specified time. *See* 220 ILCS 5/10-108, 10-109 and 10-110. Those state statutes, not explicitly preempted by any provision of the 1996 Act, do not allow the ICC to decline to resolve complaints for reasons unrelated to the complaints themselves, including a desire not to consent to suit in federal court. Accordingly the "invitation" from Congress to participate in local telephone regulation conditioned on willingness to waive sovereign immunity was, under both federal and state law, an offer that the ICC literally could not refuse.

In concluding that state regulation of agreements among local telephone service providers was no longer an "otherwise permissible activity" for state commissions, *MCI II*,

222 F.3d at 343, the court of appeals ignored the fact that federal regulatory power created this precondition for waiver. Petitioners' presence in federal court resulted not from a choice made and expressed by the State of Illinois, but from the unilateral action of Congress. Because they involve congressional powers to offer inducements, cases like *Petty* and *Dole* may not present the danger of coercion that arises where, as here, the "gift" may not be declined. Under the 1996 Act, however, the consequence of refusal to waive instead is "not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity." *College Sav. Bank*, 527 U.S. at 687; *see also Edelman*, 415 U.S. at 688 (Marshall, J., dissenting) (distinguishing between laws that "impose federal standards and liability upon... often-unwilling state agencies" and those that "induce" state immunity waiver by providing funds). As the *College Sav. Bank* Court feared, this type of one-sided "forced waiver" is merely abrogation by another name–"not even different sides of the same coin, [but] the same side of the same coin." *Id.* at 683.

In *College Sav. Bank*, the Court observed that:

> All congressional creations of private rights of action attach recovery to the defendant's commission of some act, or possession of some status, in a field where Congress has the authority to regulate conduct. Thus, *all* federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and–to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability–can be redescribed as invitations to "waiver."

527 U.S. at 683, quoting *Union Gas*, 491 U.S. at 43 (Scalia, J., dissenting) (emphasis in original). The court of appeals in this case did just what that passage condemned: it "redescribed" a unilaterally-imposed federal prescription attached

to "conscious[ ]" ICC activity that fell within Congress' regulatory field as an "invitation to 'waiver.'" The more accurate description of that action by Congress is neither a "gift" nor a "gratuity," but an abrogation.

In evaluating the voluntariness of the ICC's purported waiver of sovereign immunity, finally, the Court should consider the character of the activity from which the ICC would be excluded under the Act absent its consent to suit in federal court. Utilities regulation is a long-standing function of state government in Illinois, and the right and power to undertake it is not a gratuity Congress offered to the State. The ICC has been regulating public utilities in Illinois for almost 90 years. Moreover, federal law has been applied in the regulation of utilities in Illinois since before the ICC was created. *See, e.g., Bhd. of R. R. Trainmen v. Terminal Ry. Ass'n.*, 379 Ill 403, 411-12 (1942); *People ex rel. Stead v. Chicago, Indianapolis & Louisville Ry. Co.*, 223 Ill. 581, 594 (1906) (predating existence of ICC). Although the Court in *College Sav. Bank* found that the distinction between inherently governmental conduct and that customarily engaged in by private parties (like operating the railroad in *Parden*) was not illuminating in that commercial-activity case, it does demonstrate in this case the gravity of offense to state sovereignty posed by § 252(e)(6). If waivers of sovereign immunity cannot be obtained by threats of exclusion of a State from the "lawful" operation of a railroad or a college savings plan, it would be anomalous to hold that they could be based on threats to restrict the operation of a State's utilities commission, even where its proceedings involved consideration of federal law. The State of Illinois should not have to choose between giving up the "vital public service" performed by the ICC and "'consenting'" to federal suit." *See Employees of the Dep't of Public Health & Welfare of Missouri v. Dep't of Health & Welfare of Missouri*, 411 U.S. 279, 296-97 (1973) (Marshall, J., concurring) (internal quotations in original).

Left undisturbed, the court of appeals' effort to apply the constructive waiver doctrine to § 252(e)(6) would carry far-reaching implications. If a State, simply by acting in an area that falls within Congress' commerce power, can be deemed to have implicitly waived its sovereign immunity as a condition of continued activity in that area, Congress can easily "circumvent the antiabrobgation holding of *Seminole Tribe*." *College Sav. Bank*, 527 U.S. at 683. *College Sav. Bank* reaffirmed the principle that a State's waiver of sovereign immunity must, like any other waiver of a constitutional right, be both unequivocally expressed by the State, 527 U.S. at 680-81, and "altogether voluntary," *id.* at 676 (*citing Beers v. Arkansas*, 61 U.S. 527 (1858) (internal quotations omitted). The court of appeals' interpretation of the 1996 Act allowed Congress to impose waiver unilaterally, under the threat of exclusion of the State from a "lawful activity," a condition that bestowed no gift; rather, it "automatically" passed the "point of coercion" and "destroyed" the voluntariness of any waiver. *College Sav. Bank*, 527 U.S. at 687. For these reasons, the decision below should be reversed.

III. THE ICC'S MEMBERS CANNOT BE SUED UNDER THE DOCTRINE OF *Ex parte Young*.

The third question on which the Court granted *certiorari* involves whether Respondents can evade Illinois' sovereign immunity by means of a suit against the individual members of the ICC under the *Ex parte Young* doctrine. The court of appeals did not address the question in this case, but it did allow the case to proceed against the ICC's individual members, Pet. App. 14a, and it answered the question in the affirmative in *MCI II*, 222 F.3d at 345-48. Contrary to the court of appeals' view, however, "[t]he situation presented here... is sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine." *Seminole Tribe*, 517 U.S. at 73.

Under *Ex parte Young*, 209 U.S. 123, 159-60 (1908), the Eleventh Amendment is generally not a bar to actions by private citizens in federal court to restrain state officials from committing ongoing violations of federal law. *See also Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 276-77 (1997). The *Young* doctrine has been thought necessary to ensure the supremacy of federal law, *see Green v. Mansour*, 474 U.S. 64, 68 (1985), and its continued validity is not in doubt, *see Coeur D'Alene*, 521 U.S. at 269. But "[t]he Court has also recognized... that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst II*, 465 U.S. at 105. Accordingly, the Court has been careful not to expand the doctrine in ways that "would upset the balance of federal and state interests that [*Young*] embodies." *Papasan v. Allain*, 478 U.S. 265, 277 (1986); *see also Coeur D'Alene*, 521 U.S. at 281 (*Young*-type relief may not be available where a State's "special sovereignty interests" are at stake); *Pennhurst II*, 465 U.S. at 104-06 (state officials may not be coerced under *Ex parte Young* to conform their conduct to state law); *Edelman*, 415 U.S. at 665-66 (*Young* action will not lie to vindicate past violations of federal law).

The careful balancing of state and federal interests required under the Court's *Ex parte Young* jurisprudence weighs decidedly against the doctrine's application in this case. First, there is no need to vindicate the supremacy of federal law because state commissions performing their duties under the Act do not commit "violations" of that law by deciding federal law issues within their jurisdiction. Second, by providing a specific mechanism for judicial review of state commission decisions rendered under the Act, Congress signaled its intent not to subject individual commission members to judicially-created remedies of the sort authorized under *Ex parte Young*. *See Seminole Tribe*, 517 U.S. at 73-

76. For these reasons, the Court should reverse the judgment of the court of appeals.

A. State Commissioners Do Not Lose Their Official Character by Making Errors of Federal Law Within their Jurisdiction.

Ex parte Young only applies if a state officer is alleged to be committing an ongoing violation of federal law. *Papasan*, 478 U.S. at 277-78. Members of state public utility commissions are hardly open to this charge in the present context. They cannot be said to *violate* federal law, to be acting "without the authority of... the state in its sovereign or governmental capacity," and therefore be "stripped of [their] official and representative character," *Young*, 209 U.S. at 159-60, simply by resolving disputes within their jurisdiction, even if their decisions are based on views of federal law that, upon later review, are rejected. Because Respondents cannot overcome this traditional limitation on *Young*'s application, the Court should hold the doctrine inapplicable.

The court of appeals framed the issue in this case as "whether the ICC, in determining that under the agreements the parties intended that calls to Internet service providers would be subject to reciprocal compensation, violated federal law." (Pet. App. 15a). This statement implies that the ICC and like commissions "violate federal law" when, in the course of resolving disputes within their jurisdiction, they misapply substantive federal law or rules that govern interconnection agreements. This is wrong, at least as far as the sovereign immunity question is concerned. State commissions do not violate federal law, and thereby lose their bond to the State that employs them, by exercising that jurisdiction. *See Papasan*, 478 U.S. at 277 ("In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be illegal."). This is true even if, in the exercise of their

authority, commissions err in applying governing law. *See generally Pennhurst II*, 465 U.S. at 113 ("[A]n error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief is effectively against it.") (citation omitted); *Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104, 109-10, 96 N.E. 2d 518, 521 (1951) (ICC orders are not rendered void on the ground that they are erroneous).[16]

This result follows from *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), in which the Court barred an action for specific performance of a contract based upon the federal government's sovereign immunity, even though the named defendant was an official rather than the government agency itself. The plaintiff had named a federal agency's administrator as the defendant, but made no allegation that the administrator had acted outside his statutory authority. *Id.* at 691. Holding the action was a suit against the government even though an individual officer was the named defendant, the Court laid down the general rule:

> [T]he action of an officer of the sovereign... can be regarded as so "illegal" as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers,

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[16] There can be no dispute that the relief sought in this case is "effectively against" the ICC. The ICC acts only as a body, 220 ILCS 5/2-101 ("[E]very finding, order or decision approved by a majority of the members of the Commission shall be deemed the finding, order or decision of the Commission."), the complaint filed by Respondent Ameritech specifically sought an injunction "against enforcement of the ICC's Order," Jt. App. 145a, and even the court of appeals agreed that, in the context of an action seeking review of the ICC's determinations, its commissioners "are the Commission," Pet. App. 14a.

> or their exercise in the particular case, are constitutionally void.

Id. at 701-02. "A claim of error in the exercise of that power," the Court added, "is . . . not sufficient." *Id.* at 690.

Larson leads to the conclusion that state utilities commissioners do not violate federal law and therefore do not lose their official character when they interpret interconnection agreements, even if their interpretation contains errors of federal law. Indeed, the very action claimed to have violated federal law in *Larson* was the construction of a contract, a construction the Court assumed was wrong. *Id.* at 703. Having jurisdiction to decide the matters raised in the complaints in this case, the ICC was required to resolve them in accordance with the best judgment of the commissioners and the mandates of due process. But those commissioners cannot be sued because they render "incorrect" decisions: "We have heretofore rejected the argument that official action is invalid if based upon an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." *Larson*, 337 U.S. at 695; *see also Pennhurst II*, 465 U.S. at 112-13 & n.22.

To be sure, there are instances where state officials performing adjudicatory or quasi-adjudicatory functions are said to be in violation of federal law. *See, e.g., Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 530-33 (2000) (*per curiam*) (state court violated voters' equal protection rights by ordering manual recount of ballots without providing uniform standards for what constitutes a legal vote); *Shelley v. Kramer*, 334 U.S. 1, 20 (1948) (state court's enforcement of racially-restrictive covenant held to be in violation of the Fourteenth Amendment). But cases like these do not support the proposition that state adjudicators violate federal law whenever they misapply governing federal standards. These cases only establish that judicial officers can be state actors within the meaning of the Fourteenth Amendment, *see Kramer*, 334

U.S. at 14, a rule that stands in acknowledged tension with the fiction upon which *Young* is based, *i.e.*, that officials acting in contravention of federal law no longer act on behalf of the State for purposes of the Eleventh Amendment. *See generally Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) ("There is a well-recognized irony in *Ex parte Young*; unconstitutional conduct by a state officer may be state action for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh.") (plurality opinion). The state action cases do not address the scope of a State's sovereign immunity and thus do not diminish the rule in *Larson*. Under that rule, state adjudicators cannot be said to violate federal law by resolving disputes within their lawful jurisdiction.

B. Limiting Relief to Judicial Review of State Commission Decisions Evinces Congressional Intent to Preclude *Ex parte Young* Actions.

Even if state commissions can be said to violate federal law when they perform functions assigned to them under the Act, their individual members are not amenable to suit under *Ex parte Young*. Congress envisioned one limited and commonplace safeguard against agency error: the availability of judicial review. *See* 47 U.S.C. § 252(e)(6). Under *Seminole Tribe*, 517 U.S. at 73-76, this limited remedy forecloses the availability of *Young*-type relief.

"[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily-created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe*, 517 U.S. at 74. The remedial scheme supplied by § 252(e)(6) is not detailed in the sense that it is elaborate, but it "define[s]" and also "limit[s] significantly" the relief available. *See id.* In this case, of course, Ameritech brought suit not to enforce a

statutory right against Illinois, but rather to obtain some form of relief from the ICC's order. Still, the result was the same: state officers sued in federal court. The same principle of restraint should therefore apply. More specifically, just as courts should recoil from creating remedies in addition to those prescribed by Congress for the enforcement of federal rights, *see Seminole Tribe*, 517 U.S. at 74 (citing *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)), so too should they avoid creating additional or different federal review mechanisms when Congress has specifically provided one, *see, e.g., Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *Maxine Marine, Inc. v. Director, Officer of Workers' Compensation Programs*, 39 F.3d 144, 146 (7th Cir. 1994). Because Congress limited the remedy available to "aggrieved parties" under § 252(e)(6) to review of state commission decisions, and narrowed it even further to consideration of whether the agreement under consideration meets the requirements of specified federal laws, the additional remedies provided by the broad equitable powers of federal courts as applied to individual state officials should not be available.

In § 252(e)(6) Congress specifically provided for a familiar method of judicial review: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." To the extent this language at all contemplates a State's participation in review proceedings, it undoubtedly envisions participation by the state commission itself, not its individual members. *See AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 653 (5th Cir. 2001) (Smith, J., dissenting). In addition, it clearly contemplates traditional judicial review of administrative agency action, as would be available in analogous cases where review of an FCC order is sought. In those cases

the FCC is the appropriate defendant, not its individual members. *See generally* 28 U.S.C. § 2342(1); 47 U.S.C. § 402; *see also GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999) (FCC is proper defendant in review proceeding challenging its orders); *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (same). And when FCC orders are overturned, the courts do not issue injunctions against the FCC's individual members, as Ameritech sought here (Jt. App. 145a). Instead, cases are remanded to the agency, and the FCC is duty-bound to comply with the court's mandate. *See* 47 U.S.C. § 402(h); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) ("On review the court may thus correct errors of law and on remand the [FCC] is bound to act upon the correction."). Section 252(e)(6)'s language suggests no intention to depart from this scheme where review of a state commission's order is sought.

The Act thus contemplates nothing more than straightforward judicial review of state commission decisions. *See Bell Atlantic*, 240 F.3d at 295 ("The limit of the stated interest [under section 252(e)(6)] is the 'review' of certain State commission decisions."). There is no text-based evidence that Congress meant to supplement this mechanism by authorizing district courts to enjoin state commission members in contravention of the States' sovereign immunity. *Cf.* 5 U.S.C. § 702 (specifically waiving federal government's immunity from actions for injunctions against federal officers). To the contrary, it is doubtful that Congress, assuming it has in fact entrusted state commissions with the task of resolving disputes over the meaning of federally-mandated interconnection agreements, wanted commissioners to be hauled into federal court to answer for their alleged errors in applying federal law. As the Fourth Circuit explained in *Bell Atlantic*:

> To bring these State officers before a federal court to answer to the assertion of a private citizen that in acting within the scope of their authority they made the wrong decision would be an affront to the sovereignty of the State . . . and would undermine the mutual respect that characterizes the relationship between the federal and State sovereigns.

240 F.3d at 298.

The court of appeals rejected this argument on the ground that the Act does not explicitly limit the relief district courts may award when reviewing agency action under section 252(e)(6). *MCI II*, 222 F.3d at 347. The statute's silence on available remedies, however, cannot be construed as a congressional *imprimatur* on any kind of remedy that might be devised to enforce judgments under § 252(e)(6). No one doubts the district court's ability to enforce its judgments by injunction against persons who are proper parties to the court's proceedings. *See AT&T Communications*, 238 F.3d at 653 n.20 (Smith, J., dissenting). It is quite another matter, however, to say that state commission *members*—who are not mentioned in the text of § 252(e)(6), as proper parties or otherwise—may be named as defendants and thereby "expose[d]... to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Seminole Tribe*, 517 U.S. at 75. *Young* actions against the individual members of the ICC in the present context would "supplement" the scheme created by Congress "with one created by the judiciary." *Seminole Tribe*, 517 U.S. at 74. As the Court has made clear, it is for Congress and not the courts to choose which remedies are sufficient for the enforcement of statutory rights. *See id.* at 75-76. To allow this action to proceed under a *Young* theory would contradict the intent of Congress as reflected in the specific remedial scheme described in § 252(e)(6).

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX –
TITLE 47, UNITED STATES CODE § 251

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty–

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 [, 47 U.S.C.].

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the [FCC].

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 [, 47 U.S.C.].

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 [, 47 U.S.C.] the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network–

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 [, 47 U.S.C.].

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 [, 47 U.S.C.]. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty–

(A) to offer for resale at wholesale rates any telecommunications service that the carrier

provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the [FCC] under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996], the [FCC] shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3), the [FCC] shall consider, at a minimum, whether–

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that–

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part [47 U.S.C. §251 *et seq.*].

(e) Numbering administration

(1) Commission authority and jurisdiction

The [FCC] shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The [FCC] shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the [FCC] from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC].

(3) Universal emergency telephone number

The [FCC] and any agency or entity to which the [FCC] has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In

making the designation, the [FCC] (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on the date of enactment of the Wireless Communications and Public Safety Act of 1999 [Oct. 26, 1999].

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [, 47 U.S.C.] (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State

commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [, 47 U.S.C.] (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with [FCC] regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996].

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c)

to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996], each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services

for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996] under any court order, consent decree, or regulation, order, or policy of the [FCC], until such restrictions and obligations are explicitly superseded by regulations prescribed by the [FCC] after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the [FCC].

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that–

(A) on the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996], provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the [FCC]'s regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The [FCC] may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if–

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the [FCC]'s authority under section 201[, 47 U.S.C.].

TITLE 47, UNITED STATES CODE § 252

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251[, 47 U.S.C.], an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 [, 47 U.S.C.]. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996], shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning–

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes

within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate

with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 [, 47 U.S.C.], including the regulations prescribed by the [FCC] pursuant to section 251 [, 47 U.S.C.];

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 [, 47 U.S.C.], and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section–

(A) shall be–

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) [, 47 U.S.C.], a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless–

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed–

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the [FCC] or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) [, 47 U.S.C.], a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to

the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251 [, 47 U.S.C.], including the regulations prescribed by the [FCC] pursuant to section 251 [, 47 U.S.C.], or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 [, 47 U.S.C.], nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC]'s actions shall be the exclusive remedies for a State commission's failure to act. In any case in

which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [, 47 U.S.C.] and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 [, 47 U.S.C.] and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 [, 47 U.S.C.] and the regulations thereunder. Except as provided in section 253 [, 47 U.S.C.], nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 [, 47 U.S.C.].

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this Act [47 U.S.C. §151 *et seq.*], a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 [, 47 U.S.C.], and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act [47 U.S.C. §151 *et seq.*].

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved

under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) [, 47 U.S.C.].